United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7204

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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-7204

MIKE J. BATCHKOWSKY,

Plaintiff-Appellee,

against

PENN CENTRAL COMPANY a/k/a PENN CENTRAL TRANSPORTATION COMPANY,

Defendant and Third Party Plaintiff-Appellee,

against

ANHEUSER-BUSCH, INC.,

Third Party Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

BRIEF OF THIRD PARTY PLAINTIFF-APPELLEE

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BRIEF OF THIRD PARTY PLAINTIFF-APPELLEE

Statement

Penn Central Company a/k/a Penn Central Transportation Company (hereinafter referred to as "Penn Central") has taken no appeal from plaintiff's verdict against it

because it has been granted full contractual indemnity from third-party defendant, Anheuser-Busch, Inc. (hereinafter referred to as "Industry"), which has appealed both from the plaintiff's verdict, as excessive, and from the court's grant of indemnification, as erroneously interpreting the contract between Penn Central and Industry.

Plaintiff's letter of June 3, 1975 to the Clerk of this Court stating that he is not an appellee is not understood.

Facts

Industry's failure to mention significant facts in its brief and its failure to include in the Appendix its own pictures of the accident scene make the case it presents misleading and confusing. Fortunately, the opinion of Judge Conner remedies at least the former omission, and his findings of fact are fully supported by the evidence. The latter problem resulted from Industry's ignoring Rule 10 of the Federal Rules of Appellate Procedure in printing the Appendix. Nevertheless, a brief summary of the pertinent facts seems called for.

Penn Central commenced to furnish cars for loading and unloading to Industry at its plant in Newark, New Jersey under the agreement of February 24, 1950 (Ex. G, not in Appendix). This agreement had usual provisions making each party responsible for its own acts and equally responsible for joint fault.

When Industry later wanted to change its building, it sought permission at one track (known as B 9) in its building to reduce clearance between track center line and loading platform from the standard 8 feet to 6 feet 1 inch and Penn Central refused (Ex. 7 and 8 A 131-2, 190-1)*. A second request was made and turned down explicitly be-

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* Pages in the Appendix will be prefixed by "A".

cause of the increased danger of injury from operating under such a reduced clearance (Ex. 9 and 10, A 133-4, A 375-6). Finally, Penn Central, on being approached a third time, capitulated, after receiving legal advice that it should agree only if it were to be granted in a further agreement complete indemnity from the consequences of operating under such reduced clearance (Ex. 11, 12 and 14, A 134-9, A 377-8, A 381).

This resulted in the Supplemental Agreement of November 16, 1950 (Ex. 13, A 379). Paragraph 2 thereof required Industry to erect and maintain adequate warning to train crews of the 6 foot 1 inch clearance, and the blueprint attached to the agreement provided for an illuminated sign to be erected just outside the building and alongside the track where the danger existed reading "Platform inside building will not clear man riding on side of car". The illuminated signs actually put up later on each side of the track (which was track B 9) just outside the entrance to the building read: "Man riding on side of car will not clear platform inside building" (Ex. 1).

The indemnification clause in the Supplemental Agreement has been erroneously paraphrased on pages 3, 6, 7 and 9 of Industry's brief, but the full text and a discussion of it will be set forth in the part of this brief devoted to the law.

Plaintiff was on duty as a brakeman in a switching crew at Penn Central's Waverly Yard in New Jersey when he was injured on November 8, 1968 (A 7-11). He had been a brakeman since 1951 (A 8-9). He knew his job pretty well (A 9). His job was to help the conductor, to relay signals between conductor and engineer, etc. (A 8). The conductor's job was to boss the men, to see that the work got done, and to see that the men were properly stationed (A 8, 12). The engineer's job was to operate the locomotive (A 8).

Plaintiff had held this Waverly Yard job a couple of months, and had been at the yard longer (A 9-10). On November 8, 1968 between 9 and 10 A.M. of a clear, dry morning the crew was switching cars onto track B 9 at Industry's plant (A 11, 13). Plaintiff had worked at the plant on numerous previous occasions and was familiar with track B 9 (A 12, 15). His conductor that day was Pryle and his engineer was O'Kane, both experienced men (A 11). The second brakeman in the crew, Williams, was not involved in the accident (A 11, 147, 170, Ex. C).

Under conditions of normal clearance, the practice for the brakeman assigned to pass signals between the conductor inside the building and the engineer in his locomotive outside the building was to ride a side ladder of one of the cars being placed inside so that he could pass signals between conductor and engineer (A 14, 15, 17, 58, 86, 147, 157). Penn Central so instructed its brakemen (A 15).

Because this practice could not be followed on track B 9 owing to the close clearance (4 inches) between platform and cars, plaintiff had to find another position suitable for passing signals (A 28-9, 39, 87, 89, 123-4, 151, 158, 161, 178). Accordingly, he stationed himself on the same side of the movement as the conductor and the engineer (left side going in) about one foot out from the platform and one foot from the cars, so he could see the engineer on the curve outside, and about fifteen feet inside the doorway in a recessed area at the start of the platform where he could see the conductor (A 23, 28-9, 60, 90-2, 123, 127, 179, 276-80).

This area can best be visualized by looking at the pictures (Ex. 1-6). These pictures show that on the left shortly after entering the building on track B 9 there was a concrete railed stairway which served as part of and access to a concrete loading platform. This first part of the platform was recessed 22¾ inches back of the outer edge for a distance of 17½ feet from the doorway, as shown on the overlay which is part of Exhibits 2 and 3. The place

where plaintiff stood was marked by him with a red "X" on the overlay of Exhibit 2 (A 26, 89) and by O'Kane with a pencilled "X" on the overlay of Exhibit 3 (A 176). This was the proper place to stand (A 162, 175).

As four or five cars were being pushed (backed in) by the locomotive at four miles per hour to be stopped by signal short of the car already standing at the far or bumper end of track B 9 and being at the time worked on, plaintiff stood facing the conductor, who was further in near the lead car at the position marked "C" on Exhibit 2 (A 23-9, 31, 39-40, 57-9, 123, 148-9, 158-9, 175, Ex. 6).

While in this position, plaintiff was struck successively by two handles protruding from one refrigerator car door, probably the third or fourth lead car, which had been picked up from Industry empty (A 39-40, 106, 152-3, 171-2, 279). When these handles were not in the closed, locked position, they stuck out from the side of the car at a 45 degree angle (A 154, Ex. C). Plaintiff denied having observed those protruding handles before he was hurt (A101, 104, 122-3). Engineer O'Kane, however, testified that while this car was still outside the building plaintiff had tried to close the handles (A 173).

Law

The trial court's granting of full indemnification to Penn Central from Industry should be affirmed.

Penn Central's claim for complete indemnification from Industry rests on the following language in paragraph 3 of Exhibit 13 (A 379), which is the Supplemental Agreement dated November 16, 1950:

> "3. The Industry hereby releases and waives all right or alleged right at any time to ask for or demand damages from the Railroad Company, or its employes, that have occurred, or may occur, to the said Industry and the said structure, including loss of

service thereof, caused by or growing out of the operation of the engine, equipment and cars of the Railroad Company upon the side-track adjoining said structure by reason of the 6′1″ side clearances as shown upon the print of plan attached hereto; and the Industry further covenants and agrees to indemnify and save harmless the Railroad Company and its employes from and against all loss, cost, damage and expense and claims and demands therefor caused by or attributable to the operation by the Railroad Company of its engines, equipment and cars upon the said side-track under and adjoining said structure, or injury to or damage caused thereto or thereby, and whether to the property of the Railroad Company or to property in its possession, control or custody, to its employes, patrons or licensees, to the employes, patrons or licensees of the Industry, or to persons or property of others who may seek to hold the Railroad Company liable therefor, and whether attributable in whole or in part to the said 6′1″ clearances.''

Judge Conner has correctly determined that New Jersey law should govern the construction of the contract (A 387), and has carefully analyzed the New Jersey decisions and the meaning and intent of the language in the contract (A 388-91).

To the decisions mentioned by Judge Conner should be added *Levine* v. *Shell Oil Co.,* 28 N.Y. 2d 205 (1971), which makes it clear that New York law, after a period of confusion, is now similar to New Jersey law in its willingness to accept complete indemnification, if the parties intend it, even though the indemnitee is at fault and the language of the indemnification clause does not expressly relieve him of the consequences of his negligence or is ambiguous on this point.

To the case of *Buscaglia* v. *Owens-Corning Fiberglas,* 172 A 2d 703 (N.J. App. Div. 1961), 68 N.J. Super. 508,

aff'd 178 A 2d 208, 36 N.J. 532, cited by Judge Conner, should be added the following similar earlier decisions, cited with approval in *Buscaglia:*

Polit v. *Curtiss Wright Corp.*, 166 A 2d 387 (N.J. App. Div. 1960), 64 N.J. Super. 437;
Cozzi v. *Owens Corning Fiber Glass Corp.*, 164 A 2d 69 (N.J. App. Div. 1960), 63 N.J. Super. 117;
Stern v. *Larocca*, 140 A 2d 403 (N.J. App. Div. 1958), 49 N.J. Super. 496.

The court in *Buscaglia* said (p. 707):

> "The *Stern* and *Cozzi* cases, supra, are particularly reflective of the present-day judicial view that indemnity clauses of construction contracts are to be viewed realistically as efforts by business men to allocate as between them the cost or expense of the risk of accidents apt to arise out of construction projects on a fairly predictable basis, rather than upon the generally debatable and indeterminate criteria as to whose negligence, if any, the accident was caused by, and to what degree . . . It is generally contemplated . . . that the risk of accident claims will be covered by insurance, and the only practical feature of the bargain, ordinarily, is the decision as to who is to bear the cost of the insurance."

The court then went on to grant full contractual indemnification, even though the indemnitee's negligence contributed to the accident, on the basis of very general language granting indemnification for injuries regardless of by whom they were "occasioned", despite the absence of specific language relieving the indemnitee of the consequences of his own negligence. The court was fortified in its conclusion by the fact that the burden of guarding against the work area hazard which caused the injury rested under the contract on the indemnitor.

In the *Polit* case, *supra,* the court, faced with similar broad language, said (p. 390):

> "If the negligence of the indemnitee Curtiss be the cause, the protective scope of the indemnification may not be diminished, whether such negligence be active instead of passive or be sole instead of concurrent. To hold otherwise would be to reject the clear meaning of the words which the parties employed . . ."

In the *Cozzi* case, *supra,* where indemnification was granted, despite the indemnitee's sole active negligence, under a similar contract, the court declared (p. 72):

> "That an indemnification clause fails to refer to the negligence of the indemnitee should not be controlling. This is merely evidence of the fact that the parties contract without regard to fault, but only with regard to liability. Had the parties added the word 'negligence' in the clause, dispute might then arise as to whether liability could be imposed without fault, or even as to whether there was an intention to include injuries occasioned by the indemnitee's sole active negligence. Surely it is not necessary that parties incorporate into the language of their agreement all the specific possibilities through which the indemnitee-owner might cause an accident—by sole negligence, concurrent negligence, active sole negligence, passive concurrent negligence, etc." * * *
>
> "When, as in the present case, the language used is broad enough to manifest an intention to indemnify against an accident such as happened, irrespective of fault, the court should give it effect according to its plain and clear meaning. This was the business arrangement sensibly entered into and bargained for by the parties. There is no reason why we should not give it the sanction we would accord any other business contract equally clearly expressed."

In the *Stern* case, *supra,* the court astutely commented (p. 408):

> "Moreover, as the cases point out, to preclude recovery in every case where the negligence of the indemnitee contributed at all to the loss would leave practically no occasion where the indemnity provision would be operative."

It is clear from the negotiations leading up to the Supplemental Agreement (Ex. 7-12, 14) that Penn Central was very reluctant to agree to any clearance less than the standard 8 foot clearance, because of the increased risk of personal injuries, and therefore insisted on a complete modification of the indemnification arrangement in the original agreement, which was based on determination of who was at fault (Ex. G), to an arrangement of indemnification for all injuries occurring during the railroad operation on the sidetrack regardless of fault.

In paragraph 4 (A 380), the earlier inconsistent provisions of the original agreement are expressly stated to be no longer controlling, and in the Now, THEREFORE clause (A 380), Penn Central agreed to "operate upon the said side-track of the Industry under and adjoining the said structure with the 6'1" clearance" only "under and subject to the conditions and covenants hereafter mentioned which are hereby accepted and agreed to on the part of the Industry."

(a)

Industry's interpretation of the Supplemental Agreement is clearly erroneous.

Industry's reading of paragraph 3 of the Supplemental Agreement (Ex. 13, A 379) is neither grammatical nor reasonable. It argues in italics (Brief, page 9) that to be covered the injury must have occurred upon, under or adjoining the structure, i.e., the loading platform. The agreement says nothing of the kind.

In the agreement Industry indemnifies Penn Central from damage, etc. "caused by or attributable to the operation by the Railroad Company of its engines, equipment and cars upon the said side-track under and adjoining said structure". The phrase in the agreement is "under and adjoining said structure" not "upon, under or adjoining said structure". This phrase modifies the preceding word "side-track" under ordinary rules of grammatical construction. It does not modify the word "injury", which does not even occur earlier, nor the distant series of parallel words in which the word "damage" appears.

The same careless use of language or paraphrase occurs in three other places in Industry's brief. In the last paragraph on page 3 it says the agreement calls for "indemnity for injuries occurring on or under the 'structure' defined in the agreement as the loading platform and adjoining the tracks". This inserts a non-existent "on or", misplaces the word "adjoining", and erroneously states the definition of "structure" as "the loading platform and adjoining the tracks" when in fact "structure" is defined in the second WHEREAS clause as "platforms".

In the last paragraph on page 6 of its brief, Industry misquotes Penn Central's claim and the language of the agreement by referring to injuries "caused by" this new 6′1″ structure when the actual words found in the agreement at the end of paragraph 3 are "and whether attributable in whole or in part to the said 6′1″ clearance", which is a broader concept placed in a different grammatical concept.

In the next to last paragraph on page 7 of its brief, Industry says the agreement indemnifies only for "accidents 'by reason of' the said structure and 'under and adjoining' the said structure". The words "by reason of" occur only in the first, not the significant second, half of paragraph 3, and read "by reason of the 6′1″ side clearances" and not

"by reason of the said structure", and those words occur in the part of the paragraph in which Industry releases Penn Central not in the part where Industry indemnifies Penn Central.

The true meaning of operation by the Railroad of its equipment upon the said side-track "under and adjoining said structure" in the indemnification clause of paragraph 3 as a phrase describing and identifying the side-track is made clear by the use of similar language in the Now, THEREFORE clause where the Railroad agrees to operate upon Industry's side-track "under and adjoining the said structure".

Industry (page 7 of its brief) accuses the court of having in its opinion substituted the entire terminal facility for the structure as the place adjoining which the accident must occur before Penn Central may obtain indemnification. Neither the court nor Penn Central ever made such an argument. The most that was argued was that the agreement by its language covered liability for accidents which were caused by railroad operations upon the side-track, which argument of course implicitly rejects Industry's present strained construction.

Contrary to Industry's statement on page 8 of its brief, the proponent of substituting "adjoining" for "adjacent to" in the agreement was Industry rather than Penn Central (Ex. 15). Accordingly, these words should be construed most strictly against Industry. Applying this canon of interpretation removes all doubt that the proper way to read "under and adjoining said structure" is simply as descriptive of the word "side-track" which they immediately follow.

Industry's argument on page 9 of its brief that somehow Penn Central is being allowed to circumvent its liability to plaintiff under the Federal Employers' Liability

Act and its liability to Industry under the original agreement is patently absurd. Regardless of the outcome of Penn Central's third party action, it at all times remains directly liable to and bound to pay plaintiff, and this is not circumvented by the mere fact that it can recover from a third party what it pays out to plaintiff. The Supplemental Agreement's indemnification clauses clearly replace those in the original agreement, which there is no need to refer to at all except by way of comparison to show how completely the intent of the parties changed.

(b)

The trial court's interpretation of the Supplemental Agreement is correct.

The trial court (A 387) correctly interpreted the Supplemental Agreement as providing a full indemnification of Penn Central by Industry for all accidents resulting from railroad operations on the sidetrack regardless of Penn Central's own contributory negligence and whether the reduced clearance in any way contributed.

The court pointed out that there was no public policy against such a contract and such a result (A 387). This is true.

> *Cozzi* v. *Owens Corning Fiber Glass Corp.*, 164 A 2d 69 at 75, 63 N.J. Super. 117, *supra.*

The court further pointed out (A 388) that had not the agreement exonerated Penn Central from the consequences of its own negligence, the agreement would have been virtually meaningless, since only if Penn Central were negligent would it need indemnification.

Finally, the court pointed out (A 388-90) that the plaintiff's injury was in fact caused in part by the reduced 6′1″ clearance, since had it not been for this reduced clearance and the warning sign outside he would have followed

the usual practice of riding the cars in, thus avoiding all chance of contact with the door handles.

Industry, however, now relies on none of these grounds but on the very narrow ground discussed above in subpoint (a) and never presented to the trial court. It should be added to that discussion that even under Industry's interpretation plaintiff was injured at a location adjoining the sidetrack. Both the pictures (Ex. 2 and 3) and the testimony establish that plaintiff when injured was standing next to the part of the platform which was formed by the approach steps and by the outjut of the platform that created the recess, i.e., that he was standing in an area adjoining, touching, and, contiguous to the platform.

CONCLUSION

The judgment in favor of the third-party plaintiff against the third-party defendant should be affirmed.

Respectfully submitted,

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